

# DECISION



PLM I  
30483

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-216319

**DATE:** February 21, 1985

**MATTER OF:** Nuclear Metals, Inc.

## DIGEST:

1. Protest relating to awards under a prior solicitation is untimely and not for consideration.
2. Competitive advantage allegedly enjoyed by a mobilization base producer because of award of a prior contract at a high unit price is not improper since it was statutorily permissible and did not result from unfair government action.
3. Where a contracting agency determined to fill an additional requirement by option exercise at a reduced price, with changed delivery terms, it was required to negotiate with both contractors eligible for award.
4. Although negotiations for an additional requirement may have been conducted informally because of the contracting agency's belief that it was only exercising an option, no prejudice resulted where the only eligible offerors were both afforded equal information and an equal opportunity to compete for the requirement.

Nuclear Metals, Inc. (Nuclear) protests the award by the Army of a contract for penetrator cores to Aerojet Ordinance Company (Aerojet), under solicitation No. DAAA09-84-R-0084. Nuclear asserts that it had been awarded this requirement by the Army's exercise of an option under an award to Nuclear, and that subsequently improper negotiations were conducted with, and an award made to, Aerojet.

We deny the protest in part and dismiss it in part.

The award at issue is characterized by the Army as the exercise of an option for a quantity increase to run concurrently with performance under an existing contract. The original contract to Aerojet was part of a split award

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under the above-referenced solicitation. The procurement was negotiated pursuant to 10 U.S.C. § 2304(a)(16) (1982), as implemented by Defense Acquisition Regulation (DAR) § 3-216, as a procurement restricted to Aerojet and Nuclear as industrial mobilization base producers. This RFP, issued on February 10, 1984, was for 106,820 cores, with a 100 percent option provision. Evaluation was on the base quantity exclusive of the option quantity. On March 30, 1984, the Army awarded Nuclear a contract for 65,000 cores at a unit price of \$205.20. Nuclear's unit option price was \$225.72 f.o.b. origin, or \$226.12 f.o.b. destination. On April 20, the Army awarded Aerojet a contract for the balance of the requirement, 41,820 cores, at a unit price of \$251.00. Aerojet's unit option price was \$433.10 f.o.b. origin, and \$433.90 f.o.b. destination.

The reason for the split award, with award to Aerojet at the higher price, was the Army's desire to maintain its mobilization base for production of the cores, as authorized under the above-cited statute and regulations. As our Office has recognized, procurements negotiated thereunder are conducted with the normal concern of insuring maximum competition placed secondary to the needs of industrial mobilization, which permits award to a predetermined contractor or contractors in order to create or maintain their readiness to produce military supplies in the future. Pioneer Tool & Die Company, et al., B-211891, et al., Nov. 18, 1983, 83-2 C.P.D. ¶ 584; National Presto Industries, Inc., B-195679, Dec. 19, 1979, 79-2 C.P.D. ¶ 418; 49 Comp. Gen. 846 (1970).

After making awards, the Army determined that it had an additional requirement for 12,751 cores. The Army's characterization of the ensuing course of events is that the additional requirement, eventually increased to 19,339 cores, was awarded to Aerojet by exercise of the option on August 23, implemented by a contract modification which reflected Aerojet's reduced option unit price of \$175.00 per core, with the existing monthly delivery schedule modified to incorporate a concurrent production increase. The Army indicates that this action was taken after both Nuclear and Aerojet were advised of the additional requirement and given an opportunity to submit reduced option prices.

Nuclear's understanding of the events is different. Nuclear asserts that on July 19 it received an award of

12,751 additional cores by the Army's exercise of Nuclear's option at a price equal to the base unit price of \$205.20 reduced in exchange for a shortened delivery schedule. In particular, Nuclear alleges that an Army contract specialist specifically negotiated and agreed to this arrangement with Nuclear personnel by telephone calls which occurred on July 19. Nuclear states that the Army had also previously made contract modifications by such telephone calls. Nuclear further asserts that it was advised on July 19 that a contract modification reflecting the oral agreement would be in place in time for the forthcoming shipment, and that Nuclear was advised to proceed with a production rate which reflected the increase. Nuclear contends that in reliance on this representation, it took steps to produce and ship the cores in accordance with the increased production level.

Nuclear states that on July 25, it received the following mailgram dated July 23, from the Army which Nuclear asserts is consistent with its oral agreement:

"The Government has an additional requirement for 12,751 ea core f/projectile 105MM, APFSDS-T, M833. In accordance with the option for increased quantity CH-20 of referenced contract. Request your option price be based on concurrent [extended] delivery for this increased quantity. The deliveries should be spread equally over the contract performance period or as a minimum of 10 months period.

Request your option price be forwarded to the PCO as soon as possible."

Nuclear states that its copy of the mailgram, unlike the copy in the agency report, did not indicate that Aerojet had received a similar communication. Nuclear also states that on July 24, it received a letter confirming the change in delivery schedule. This letter states:

"Reference Contract DAAA09-84-C-0453.

In an attempt to level out the production schedule of the referenced contract, Nuclear Metals is hereby authorized to ship to the following delivery schedule.

30 Jul 84 thru 30 Nov 84 - 6,000 each

30 Dec 84 thru 30 Jun 85 - 5,000 each

Modification P00003 will be issued to the contract to reflect this delivery schedule change."

Nuclear points out that a notice was published on July 26 in the Commerce Business Daily (CBD), which refers to Nuclear's initial contract and states that:

". . .Exercise of the option provision in Contract. . . to Mobilization Base Producer Nuclear Metals, Inc. . . . - Award date o/a 16 Aug, 84 - . . ."

Nuclear contends that by these actions, the Army made award to Nuclear under the option clause of the original contract. Nuclear asserts that some time after award was made, the Army entered into negotiations with Aerojet. Nuclear indicates that it was aware of a correcting CBD notice of August 3, which states that the Army was contemplating award of the referenced additional cores "by exercise of the option provision in the contract to mobilization base producers," [plural] on or about August 16." Nuclear also indicates that on August 7 and 10, it was telephonically advised by the Army that the option quantity requirement had increased, and in each instance it verified by letter that its price would remain the same. On August 24, Nuclear learned that the Army had awarded the contract to Aerojet on August 23, at \$175 per unit for the 19,339 cores.

In addition to its assertion that it had already received an award, Nuclear protests that the negotiations with Aerojet were undertaken without notice to Nuclear that another offer was being considered, which it considers to be unfair, secret dealings by the Army. Nuclear also objects that Aerojet's low price was the result of the government subsidy which was provided by the initial award to Aerojet at a high unit price, and that the award of the option to Aerojet results in a higher overall price than would have resulted from award to Nuclear.

With respect to Nuclear's allegation that it had been awarded an oral contract for the option exercise, the Army disputes Nuclear's version of the facts. In particular, the Army contract specialist states that he had no conversation

with any Nuclear personnel on July 19, and that while on either July 17 or 18, he spoke with Nuclear personnel, this was only to solicit Nuclear's interest in the requirement for 12,751 additional cores. The specialist states that he advised Nuclear that award of the additional requirement would be made to only one of the two contractors, and sought to obtain Nuclear's price for the additional requirement. The contracting specialist states that he gave no assurances that the option quantities could be delivered during the current delivery schedule, rather than subsequently, as provided for under the contract. The Army agrees that it published a CBD notice which stated an intention to award by exercise of its option under the Nuclear contract. However, the Army points out that this notice referred only to 12,751 cores, rather than the 19,339 cores which were actually awarded, and that it refers not to an award already made, but rather to an award proposed to be made on or about August 16. In addition, the Army points to the CBD notice of August 3, which specifically indicated that it was a correction of the previous notice, and stated that award was contemplated by exercise of an option to "mobilization base producers."

The Army contends that there is no evidence of any award to Nuclear, other than Nuclear's disputed version of the July 19 telephone conversation. In this regard, it points out that the Army's July 23 mailgram formally advised both contractors that there was an additional requirement, and requested a new option price. Regarding the July 24 letter to Nuclear, the Army points out that it merely refers to leveling out the existing production schedule, and makes no change in the quantity awarded. The Army states that even under Nuclear's version of the alleged award conversation, the quantity discussed was substantially different than that eventually awarded, and, thus, there is no indication of agreement on material terms of the alleged contract. Finally, the Army asserts that Nuclear's protest is untimely since, at the latest, Nuclear had notice on August 3, by the corrected CBD notice, that it had not been awarded the contract, but Nuclear did not file its initial protest with the Army until August 27, more than 10 working days after it had knowledge of its basis for protest.

We agree that to the extent Nuclear is alleging that it was awarded a contract on July 19, its protest filed more than 10 working days after it had actual or constructive

notice (by the August 3 CBD notice) that the agency did not so view the situation, is untimely under our Bid Protest Procedures. 4 C.F.R. § 21.2 (b)(2) (1984); Econometric Research, Inc., B-213947, Jan. 23, 1984, 84-1 C.P.D. ¶ 103.

Nuclear also asserts that award to Aerojet constituted bad procurement policy, because it is at a higher overall price than would have resulted from award to Nuclear, and that Aerojet's low option unit price is the result of the subsidy which Aerojet received by its initial award at a unit price substantially in excess of the unit price of Nuclear's award.

To the extent that this allegation protests the initial award to Aerojet, it is clearly untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2 (b)(2). The award to Aerojet was made on April 20, and Nuclear's protest was not filed with GAO until September 7. Regarding Nuclear's allegation that the award to Aerojet results in a higher total price than award to Nuclear, this allegation is incorrect. Aerojet's unit price is \$175 versus Nuclear's unit price of \$205.20. Only by combining the prices of the original award with the price for the additional requirements can Nuclear assert that its total price would be lower. The present issue concerns only Nuclear's higher quoted price for the option. Moreover, in addition to the fact that the protest of the earlier award is untimely, as noted above the Army was acting within its right to maintain mobilization capacity by awarding part of the original contract to Aerojet at a higher price.

Regarding the alleged "subsidy" which Aerojet received by virtue of its initial award, the price differential between the two awards was less than 20 percent (Nuclear's unit price was \$205.20 versus Aerojet's unit price of \$251). This is really a protest against the initial award to Aerojet and is untimely. If viewed as a protest against the evaluation formula in the initial solicitation, which considered only base price, without evaluation of option prices, it is also untimely. 4 C.F.R. § 21.2 (b)(1). To the extent that Nuclear is objecting to any competitive advantage which Aerojet obtained by virtue of the earlier award, our Office has consistently held that the government is under no obligation to eliminate an advantage which a firm may enjoy because of its particular circumstances, including the award of other contracts by the government, unless the advantage has resulted from unfair action on the

part of the government. Pioneer Tool & Die, et al., B-211891, supra; Lanson Industries, Inc., 60 Comp. Gen. 661, 666 (1981), 81-2 C.P.D. ¶ 176. We have specifically held that any advantage obtained as the result of an award such as this to maintain mobilization readiness, does not constitute a proscribed unfair advantage. Pioneer Tool & Die Company, et al., supra.

Nuclear's assertion that the Army engaged in prohibited secret dealings or negotiations with Aerojet is unsupported by the record. The Army characterizes its negotiations with Aerojet and Nuclear as testing the market after it determined pursuant to the Federal Acquisition Regulation, § 17.207(d) that both contractor's prices were excessively high. The Army offered both contractors an opportunity to lower their option prices in consideration of the right to deliver the additional requirement on a concurrent basis, rather than a follow-on basis. The Army contends that either the award constituted an option exercise, or that its action constituted proper negotiations with both parties.

As the Army correctly points out, our decisions in Varian Associates, Inc., B-208281, Feb. 16, 1983, 83-1 C.P.D. ¶ 160, and Department of the Army--Reconsideration, B-208281.2, July 12, 1983, 83-2 C.P.D. ¶ 78, require that where an agency offers an incumbent the opportunity to reduce its option price, it is required to conduct negotiations where the facts indicate that price competition may be available. Having determined that the option prices were excessive, and having given Nuclear an opportunity to reduce its option price, the agency properly provided Aerojet a similar opportunity. While no formal negotiations were conducted, we believe that this is a question of form only. The Army had made an appropriate determination that these were the only two mobilization base producers with which negotiations for the item in question could be conducted. In the August 3, correcting CBD notice, the Army provided notice that both producers were being considered for award of the additional requirement. Both eligible offerors were given the same opportunity to reduce their option prices, and apprised of the same information with respect to quantity and delivery changes. We do not see any prejudice to Nuclear resulting from the fact that more formalized negotiation procedures were not employed, or from the fact that the award was characterized by the Army as an option exercise.

To the extent that Nuclear believes it was entitled to award on a sole source basis, by option exercise at a modified price, this is clearly impermissible. Varian Associates, Inc., B-208281, supra. Moreover, with respect to an option exercisable at the sole discretion of the government, as here, our Office will not consider under our Bid Protest Procedures an incumbent contractor's contention that an agency should have exercised or is obligated to exercise such an option provision. Lanson Industries, Inc., 60 Comp. Gen. 661, 664, supra. Similarly, our Office will not review a protest that an agency should award a contract on a sole-source basis since the objective of our bid protest function is to insure full and free competition for government contracts. Kisco Company, Inc., B-212832, Sept. 23, 1983, 83-2 C.P.D. ¶ 372.

Accordingly, we dismiss the protest in part and deny it in part.

*Harry R. Van Cleve*

Harry R. Van Cleve  
General Counsel